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Supreme Court of the United States

October Term, 1969

No. 970

NEETA WEBB,

Petitioner,

v.

ROBERT E. NOLAN, M.D.,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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Of Counsel

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The respondent, Robert E. Nolan, respectfully submits to the Court that the plaintiff's petition for a Writ of Certiorari to obtain review by the Supreme Court of an interlocutory order denying plaintiff's request for a jury trial in a civil case, where no request for jury trial had been made within the time permitted by Rule 38 of the Federal Rules of Civil Procedure, is frivolous, without merit, and should be denied.

STATEMENT OF FACTS

The following facts appear of record:

1. The plaintiff instituted this medical malpractice action on August 31, 1967, by the filing of a Complaint signed

by the attorney then representing her. The Complaint did not demand a jury trial.

2. The defendant filed Answer and Counterclaim. The defendant did not request a jury trial.

3. An initial pre-trial conference was held in this case on December 14, 1967, which conference was attended by counsel then representing the plaintiff. A written memorandum of said initial pre-trial conference, signed by the Honorable Eugene A. Gordon, United States District Judge, was entered on December 15, 1967, which written memorandum appears of record. Paragraph 10 of said memorandum recites "a trial by jury has not been demanded within the time provided by the Federal Rules of Civil Procedure, and it is ordered that the case be placed on the non-jury docket."

4. On January 16, 1968, a motion was filed by counsel then representing plaintiff reciting that no demand for jury trial had been made within the time permitted by the Federal Rules of Civil Procedure, and praying that the Court in its discretion enter an order allowing a jury trial.

5. The defendant filed a written response opposing said motion for a discretionary order allowing jury trial.

6. On April 12, 1968, the plaintiff and the counsel then representing her filed a joint motion seeking an order to allow counsel then representing plaintiff to withdraw from the case. Said motion specifically referred to the fact that a motion for jury trial was pending; and said order was signed by the plaintiff herself in addition to being signed by the counsel then representing her.

7. On July 22, 1968, a consent order was entered by the District Judge granting the plaintiff an extension of the discovery to permit her to retain new counsel; and plaintiff did thereafter retain new counsel.

8. On November 1, 1968, an order was entered by the District Judge allowing plaintiff's second counsel to withdraw from the case. Since that time plaintiff has been representing herself.

9. On December 21, 1968, plaintiff filed a petition for a discretionary order allowing trial by jury.

10. On December 30, 1968, the defendant, through counsel, filed a response opposing plaintiff's petition for jury trial.

11. A final pre-trial conference was held in this case on April 11, 1969, before the Honorable Eugene A. Gordon, United States District Judge. At that time plaintiff argued her motion for a discretionary order permitting trial by jury. The trial judge, in his discretion, denied plaintiff's motion; and on April 17, 1969, entered an order denying the plaintiff's motion for jury trial. (Order printed in Appendix to this brief.)

12. The plaintiff thereafter filed a "Notice of Appeal" from said interlocutory order to the United States Court of Appeals for the *Second* Circuit. Said "Notice of Appeal" was amended by the plaintiff on June 23, 1969, to direct said "Notice of Appeal" to the Court of Appeals for the *Fourth* Circuit.

13. On June 24, 1969, the defendant filed a "Motion to Dismiss Plaintiff's Purported Appeal," and supporting brief.

14. On July 14, 1969, an order was entered by the Honorable Clement F. Haynsworth, Jr., Chief Judge, United States Court of Appeals for the Fourth Circuit, dismissing plaintiff's appeal from the interlocutory order of the District Court denying her motion for jury trial.

15. On October 16, 1969, the plaintiff apparently filed a "Notice of Appeal" to the Supreme Court of the United States. (Neither the defendant nor his counsel were served with a copy of said document.)

16. On or about November 12, 1969, the defendant was served by mail with an "Amended Notice of Appeal to the Supreme Court of the United States." Thereafter the defendant was advised by the office of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, by letter dated November 26, 1969, that Plaintiff's notice of appeal had been returned to her on November 24, 1969, "for the reason that such notice is not filed in this Court."

17. On or about December 12, 1969, the defendant was served with a copy of plaintiff's printed "Petition For A Writ of Certiorari."

DISCUSSION

The respondent respectfully submits that the plaintiff's petition for writ of certiorari should be denied, for the following reasons:

First, there is no statutory authority which would permit the plaintiff to seek direct review by the Supreme Court of the United States, either by appeal or certiorari, of an interlocutory order of a District Court in a civil case denying a motion for jury trial under Rule 39(b) of the Federal Rules of Civil Procedure. It is assumed that what petitioner is attempting here is a review by the Supreme Court of the order of the Fourth Circuit Court of Appeals dismissing her purported appeal to that Court.

Second, the order from which the petitioner attempted to appeal to the Fourth Circuit Court of Appeals was an

interlocutory order, and not appealable under the provisions of Title 28 of the United States Code, Section 1254.

Third, neither plaintiff's "Notice of Appeal to the Supreme Court of the United States" nor her "Petition For A Writ of Certiorari" were filed within the time prescribed by Rule 11(3) or Rule 22(3) of the Supreme Court Rules. The order of the Fourth Circuit Court of Appeals dismissing plaintiff's appeal to that Court was filed on July 14, 1969. The plaintiff's "Notice of Appeal to the Supreme Court of the United States" was filed on October 16, 1969. Plaintiff's "Petition For A Writ of Certiorari" was filed on or about December 12, 1969. Neither of these documents were filed within the time allowed by Title 28 of the United States Code, Section 2101(c), which provides that an appeal or petition for a writ of certiorari intending to bring a matter of this nature before the Supreme Court of the United States for review must be taken or applied for within ninety (90) days after the entry of the judgment or decree which is sought to be reviewed.

Fourth, Rule 38(b) of the Federal Rules of Civil Procedure gives a party *a right* to trial by jury *only if jury trial is demanded not later than ten (10) days after the service of the last pleading.* Rule 38(d) of the Federal Rules of Civil Procedure provides that the failure of the party to request a jury trial as provided by Rule 38 constitutes a *waiver* by him of his right to trial by jury. The granting or denying of a jury trial thereafter is entirely within the discretion of the Court. In the present case, the District Court, in the exercise of its discretion, did not deem it advisable to grant plaintiff's request for a jury trial at the time of the final pre-trial conference, some two years after the institution of the action.

Fifth, the plaintiff's petition for a writ of certiorari is frivolous, without merit, improper, and should be denied.

CONCLUSION

The defendant respectfully prays this Honorable Court to deny plaintiff's petition, and to allow this case to proceed to disposition on the merits in the District Court.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Civil Action C-179-WS-67

NEETA WEBB

VS.

ROBERT E. NOLAN, M.D.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned at final pre-trial conference on April 11, 1969 and the plaintiff having moved for trial by jury of all issues of fact in this action and the Court having heard the arguments of the plaintiff in support of her motion and the Court being of the opinion that the motion should be denied;

NOW, THEREFORE, it is hereby ORDERED that the plaintiff's motion for jury trial in this cause be and the same is hereby denied.

This 17 day of April, 1969.

/s/ EUGENE A. GORDON
United States District Judge